EXTINGUISHMENT OF EASEMENTS BY IMPOSSIBILITY OF USER.

Suppose that the owners of Blackacre have a right to use a well or wharf situated on Whiteacre. It is manifest that a right to pass and repass over Whiteacre to the well or wharf is an incident of the easement.[1] Suppose that the wharf is destroyed by the act of God or taken by eminent domain; what is the effect on the right to pass and repass? Suppose that the owner of the well wrongfully destroys it, what is the effect, if any, on the easement? Or, to put the problem in another way, what is the effect of impossibility of user upon an easement?

An easement is a liberty, privilege or advantage, without profit, which the owner of one parcel of land may have in the lands of another.[2] It is a right of land against land. It runs with the dominant tenement against the servient tenement. Hence a true easement has three necessary elements; a parcel of land to which it is appurtenant, the parcel of land which is subject thereto, and the right itself, whatever it may be.[3] It is true that some states permit the creation of an easement in gross[4]—that is, a right without profit which a given individual may have in the lands of another. The cases supposed, however, will apply with equal force to easements in gross. The distinction, therefore, between true easements and easements in gross need not be further considered.

I.

An easement may be appurtenant to the fee,[5] or to some lesser estate, such as an estate for life[6] or years.[7] It may also be ap-

[1]Hancock *v.* Wentworth (Mass. 1843) 5 Metc. 446; Central Wharf *v.* India Wharf (1878) 123 Mass. 567; Ballard *v.* Butler (1849) 30 Me. 94; Freedom *v.* Norris (1891) 128 Ind. 377; Hahn *v.* Baker Lodge (1891) 21 Ore. 30.

[2]See cases collected 14 Cyc. 1139 note 2.

[3]See cases collected 14 Cyc. 1139 note 8.

[4]14 Cyc. 1140.

[5]Weis *v.* Meyer (1891) 55 Ark. 18.

[6]Hoffman *v.* Savage (1818) 15 Mass. 130; Maguire *v.* Safford (1901) Mass. Land Ct. Dec. 58.

[7]Newhoff *v.* Mayo (1891) 48 N. J. Eq. 619; see also Powers *v.* Harlow (1884) 53 Mich. 507, and cases cited in notes 8 and 9.

purtenant to a particular structure[8] on the land, as distinguished from the land itself. Indeed, the right may even be appurtenant to a portion of a structure such as the second story of a building.[9] The distinction between an easement appurtenant to the fee, and an easement appurtenant to some lesser estate or to a particular structure is vital. It is clear that the easement can be no greater than that to which it is appurtenant. If the estate to which the easement is appurtenant determines or if the thing to which it is appurtenant is destroyed the easement must of necessity perish for want of a dominant estate.

In *Weis* v. *Meyer*[10] the owners of Lot A. had an easement to land upon Lot B., which touched the Mississippi river. The river washed away the dominant tenement. Held, that the easement was thereby extinguished.

In *Hoffman* v. *Savage*[11] a right of way was appurtenant to a dower estate. Held, that the death of the dowager terminated the easement.

In *Day* v. *Walden*[12] a right of flowage was appurtenant to a particular mill structure. The mill burned. Held, that the easement of flowage determined.

In *Cotting* v. *Boston* [13] a right of way was appurtenant to a particular store. The owner of the dominant tenement pulled down this store and erected a new one in its place of exactly similar dimensions. Held, that the easement was thereby ended.

In *National Guaranteed Manure Co.* v. *Donald*[14] an easement to take water was appurtenant to a particular canal. Held, that the right ceased when the canal was filled up.

In *Hahn* v. *Baker Lodge*[15] the plaintiff conveyed to the de-

[8]Day *v.* Walden (1881) 46 Mich. 575 (mill); Taylor *v.* Hampton (S. C. 1827) 4 McCord 96 (mill); Nagaunee etc. Co. *v.* Iron Cliffs Co. (1903) 134 Mich. 264 (smelting furnace); National etc. Co. *v.* Donald (1859) 4 Hurl & N. 8 (canal); Cotting *v.* Boston (1909) 201 Mass. 97 (store).

[9]Hahn *v.* Baker Lodge (1891) 21 Ore. 30.

[10](1891) 55 Ark. 18.

[11](1818) 15 Mass. 130; Maguire *v.* Safford (1901) Mass. Land Ct. Dec. 58, *accord.*

[12](1881) 46 Mich. 375. *Cf.* Hottell *v.* Farmers' Protective Ass'n. (1898) 25 Colo. 67.

[13](1909) 201 Mass. 97. *Cf.* City Nat. Bank *v.* Van Meter (1899) 59 N. J. Eq. 32.

[14](1859) 4 Hurl and N. 8. Jessup *v.* Loucks (1867) 55 Pa. St. 350; Riefler & Sons *v.* Wayne etc. Co. (1911) 232 Pa. St. 282, *accord.*

[15](1891) 21 Ore. 30. Shirley *v.* Crabb (1894) 138 Ind. 200; Bonney *v.* Greenwood (1902) 96 Me. 335, *accord*

fendant the second story of a certain building with a right of way to such second story. The building burned. Held, that the right of way determined.

II.

The nature and extent of the servient estate may vary like the nature and extent of the dominant estate. Sometimes the fee iself is made subject to the right of the dominant tenement. On the other hand, the servient tenement may be only an estate for years,[16] or the right may be a limited one such as to maintain a railway[17] or a railroad crossing.[18] Again the right may be only to use a present existing structure such as a wharf,[19] a privy,[20] a well,[21] a stairway,[22] a party wall,[23] or a chimney.[24] Thus the link which binds the dominant to the servient estate may be of varying strength or permanence. Destruction of this link, like destruction of the dominant tenement or estate, is fatal to the easement.

Thus in *Central Wharf* v. *India Wharf*[25] the destruction of a dock by eminent domain was held to terminate the right to use it or any part of the servient tenement.

In *Ballard* v. *Butler*[26] even the wrongful destruction of a well was held to have determined the easement to use it.

In the same way a right to use a particular stairway ends with the destruction of the stairway,[27] even though a similar stairway replaced it.[28]

Again where two buildings have a mutual easement of support in a party wall, destruction of the wall terminates the easement and

[16]Newhoff *v.* Mayo (1891) 48 N. J. Eq. 619.

[17]Bangs *v.* Potter (1883) 135 Mass. 245; Southern Ry. Co. *v.* City of Memphis (1899) 97 Fed. 819.

[18]*In re* Railroad Commissioners (1897) 91 Me. 135.

[19]Central Wharf *v.* India Wharf (1878) 123 Mass. 567.

[20]Hancock *v.* Wentworth (Mass. 1843) 5 Metc. 446.

[21]Ballard *v.* Butler (1849) 30 Me. 94.

[22]Shirley *v.* Crabb (1894) 138 Ind. 200; Willard *v.* Calhoun (1886) 70 Ia. 650; Stenz *v.* Mahoney (1902) 114 Wis. 117; Bonney *v.* Greenwood (1902) 96 Me. 335.

[23]Hoffman *v.* Kuhn (1880) 57 Miss. 746; Heartt *v.* Kruger (1890) 121 N. Y. 386; Duncan *v.* Rodecker (1895) 90 Wis. 1.

[24]Canny *v.* Andrews (1877) 123 Mass. 155.

[25](1878) 123 Mass. 567.

[26](1849) 30 Me. 94.

[27]See note 22.

[28]Stenz *v.* Mahoney (1902) 114 Wis. 117; *cf.* Cotting *v.* Boston (1909) 201 Mass. 97 and Douglas *v.* Coonley (1898) 156 N. Y. 521.

neither party may rebuild the wall without a fresh agreement.[29] On the other hand, if the wall be injured, but not destroyed, it may be repaired,[30] though the decisions are conflicting as to the effect of destruction of the buildings leaving the wall fit for use after repairs.[31]

III.

As has been already shown termination of the dominant or of the servient estate ends the easement. In the one case there is no estate which can claim the easement; in the other there is no estate on which the right can operate. The same result was held to follow where the right was appurtenant to a particular structure or a particular structure was servient thereto. Here, of course, destruction of the structure did not render user of the easement absolutely impossible. A similar structure might replace it and user go on precisely as if no accident had occurred. But private easements are not favored by the courts because of their restrictive character. They run with the land and burden it. Consequently the courts have been very ready to find that the parties intended to restrict the right to some particular structure which ultimately would be destroyed and thereby relieve the land of what might otherwise be a perpetual servitude.

The same tendency is apparent with respect to the incidents of an easement. Thus a right to use a particular structure on the servient tenement necessarily includes as an incident a right to pass and repass to such structure.[32] If the particular structure be destroyed, as has been shown, the right to use it ceases. But the right to pass and repass thereto may have been of considerable incidental benefit to the dominant estate. Yet the incidental right is held to cease with the principal right.

In *Freedom* v. *Norris*,[33] the town of Freedom had a right to pass and repass over the land of Norris to a landing on the White River. Commerce ceased on the White River and the landing was abandoned. Held, that the right to pass and repass determined.

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[29]See note 23. *Cf.* Douglas *v.* Coonley (1898) 156 N. Y. 521.

[30]Brondage *v.* Warner (N. Y. 1841) 2 Hill 145. But repairs cannot be compelled in the absence of express agreement to repair. Pierce *v.* Dyer (1872) 109 Mass. 375.

[31]Hoffman *v.* Kuhn (1880) 57 Miss. 746. *cf.* Brondage *v.* Warner (N. Y. 1841) 2 Hill 145.

[32]See note 1.

[33](1891) 128 Ind. 377.

In *Willard* v. *Calhoun*[34] the plaintiff owned the west third of a certain building, the defendant owned the middle third and one Brown the east third. The plaintiff had an easement of passage over a stair on Brown's land and through the hall on Calhoun's land to the upper floor of his third of the building. By certain foreclosure proceedings the right to use the stair was lost, but the plaintiff brought a bill in equity to restrain Calhoun from obstructing user of Calhoun's hallway. Held, that the right to use the hallway determined with the right to use the stair.

In *Mussey* v. *Union Wharf*[35] the plaintiff had an easement of passage for vessels over flats to and from his land. The City of Portland laid out a street between the plaintiff's land and the water which prevented vessels from reaching plaintiff's land. The defendant proposed to build a wharf on the flats beyond the street. Held, that the plaintiff's easement ceased when the street was laid out.

In *Hancock* v. *Wentworth*[36] the owner of certain premises had the privilege of using certain privies on Mill Creek, together with a right to pass and repass thereto. The City of Boston laid out a street over the land on which the privies stood and destroyed them. The court in an elaborate *dictum* intimated that the incidental right to pass and repass ceased with the destruction of the privies.

In *Central Wharf* v. *India Wharf*[37] the defendant, who owned an open dock, granted the plaintiff the use thereof together with free ingress and egress thereto. The deed further provided that no building should be erected within the bounds of the dock. Thereafter the City of Boston constructed a street between the shore line and the dock and filled up the dock. The defendant then built on the land so filled and the plaintiff brought an action of tort for disturbance of his easement. The Court held that the construction of the street rendered user of the easement impossible and thereby extinguished it; and that the right of ingress and egress, and also the right to have no building erected within the dock were incidents of the principal easement and determined therewith.

In *Bangs* v. *Potter*[38] the common grantor of plaintiff and defendant sold certain lots with reference to a plan which reserved a strip fourteen feet wide between the lots for a spur-track. The grantees received the fee in this strip subject to the use for the

[34] (1886) 70 Ia. 650.
[35] (1856) 41 Me. 34.
[36] (Mass. 1843) 5 Metc. 446.
[37] (1878) 123 Mass. 567.
[38] (1883) 135 Mass. 245.

track. The use of the spur-track was abandoned but the strip remained open and was used as a way, though not long enough to give a prescriptive right to such use. So long as the strip remained open the various lots were benefitted by the additional light and air. The defendant built on his part of the fourteen foot strip and the plaintiff brought a bill in equity to restrain him. Held, that the easement reserved was for a spur-track only, and when this use was abandoned all restriction upon the use of the strip ceased.

In *Day* v. *Walden*[39] the plaintiff had a mill to which was appurtenant an easement to maintain a dam for water-power. The mill burned, and the defendant (owner of the servient tenement) removed the dam whereupon the plaintiff brought an action on the case. Held, that the easement was appurtenant to the particular mill structure which burned and ceased therewith.

Cooley, *J.* said: "Such a grant, in its enjoyment, is as permanent only as the creation of which it is an incident, and necessarily as unstable. Like the natural phenomenon of the shadow cast by a substance, it vanishes when the substance disappears."

In *Hahn* v. *Baker Lodge*[40] the plaintiff conveyed to the defendant the second story of a certain building together with a right of ingress and egress thereto. The building burned. Held, that all interest which the defendant had in the soil determined and with it the right of ingress and egress.

In Southern Ry. Co. v. *Memphis*[41] the defendant city granted to the plaintiff the right to construct and operate in certain streets a single track street railway "by horse or other animal power." After the tracks were laid it was found impossible to operate the railway by horse or other animal power by reason of the steepness of the grade. For a time the city permitted the plaintiff to use a small dummy engine but subsequently withdrew this permission and proposed to tear up the tracks, whereupon the plaintiff brought a bill in equity to prevent such removal. The bill was dismissed upon the ground that since operation in the prescribed manner was impossible the incidental right to maintain the tracks also ceased. Lurton, *J.*, said:

"That which is only accessory cannot subsist when the principle right is lost."

[39](1881) 46 Mich. 575, 586. See also Jessup *v.* Loucks (1867) 55 Pa. St. 350, 362; Negaunee Iron Co. *v.* Iron Cliffs Co. (1903) 134 Mich. 264, 286, where the court uses the same figure.

[40](1891) 21 Ore. 30. See *ante* note 15.

[41](1899) 97 Fed. 819, 821.

IV.

An easement to use a particular structure ceases when the structure is destroyed. The continuance of the structure is really an unexpressed condition of the easement. Contracts touching a particular subject matter are subject to a similar condition.[42] But the condition may happen in various ways. The structure may be destroyed by the act of God, by the wrongful act of a third party, by eminent domain or by the wrongful act of either party to the easement. As has been already shown destruction of the structure by the act of God, by eminent domain or by the act of the owner of the dominant tenement terminates the easement and its incidents. By analogy the same result should be reached where the structure is destroyed by the wrongful act of a third party. In all these cases the condition has happened without any fault on the part of the owner of the servient tenement. While therefore, the wrongdoer may be held responsible in damages[43] and compensation may be obtained in eminent domain proceedings[44] no right either in law or in equity continues against the servient tenement.

Suppose, however, that the servient structure be destroyed wrongfully by the owner of the servient tenement. It is still true that the condition which terminates the easement has happened. Yet it has happened by the wrong of the party whose estate is subject to the easement. One case intimates that at law the easement has determined.[45] But the rights of the parties in equity seem to be open upon the authorities.

The question involves several conflicting principles. In the first place it is a familiar maxim that a man shall not profit by his own wrong. But this maxim would scarcely enable the chancellor to decree that the easement should be appurtenant to the fee. Such a decree would give the dominant tenement an absolute easement instead of a conditional one. Moreover, it would

[42]Scruggs *v.* Driver (1857) 31 Ala. 274; Fritzler *v.* Robinson (1886) 70 Ia. 500; Gibson *v.* Pelkie (1877) 37 Mich. 380; Blake *v.* Lobb's Estate (1896) 110 Mich. 608; Cook *v.* Andrews (1880) 36 Oh. St. 174; Muhlenberg *v.* Henning (1887) 116 Pa. St. 138; United States *v.* Charles (1896) 74 Fed. 142; Ridgley *v.* Conewago Iron Co. (1893) 53 Fed. 988; Couturier *v.* Hastie (1856) 5 H. L. Cas. 673; Lord Clifford *v.* Watts (1870) L. R. 5 C. P. 576.

[43]Ballard *v.* Butler (1849) 30 Me. 94.

[44]Hancock *v.* Wentworth (Mass. 1843) 5 Metc. 446, *semble;* Central Wharf *v.* India Wharf (1878) 123 Mass. 567, *semble,* though not if the easement has been previously terminated by the act of God. Shawmut Nat. Bank *v.* Boston (1875) 118 Mass. 125.

[45]Ballard *v.* Butler (1849) 30 Me. 94.

by judicial decree make for the parties a bargain which they never made for themselves. Cases touching the reformation of instruments declare that the chancellor has no power to make a contract for the parties.[46] It may well be doubted, therefore, whether the court could properly make such a decree.

The same argument applies in principle to a decree which would compel the restoration of the structure destroyed. The contract of the parties attached the easement to a particular structure. That structure has ceased to exist. No power can bring back *that particular building*. The most that can be done is to create a *new building* which is precisely similar. But the parties have not attached the easement to this new building.[47] To forge the connecting link a new bargain is required. True, it may be urged that easements are created by prescription. To this extent the law does in effect make a contract for the parties—upon the somewhat violent fiction that adverse user for the prescriptive period is evidence of a lost grant. But this is an anomaly which would scarcely warrant the chancellor in making a new bargain for the parties.

Moreover, another principle or rather practice of courts of Chancery points to the same result. Equity is very slow to assume the burden of superintending the erection of structures. It is true that equity in a clear case may compel the removal of a structure. But that is the converse of the problem here. Moreover destruction involves far less superintendence than construction. And in this case the construction (if ordered) raises problems of peculiar nicety since the new building must exactly correspond to the old. In one case, it is true, equity did order the installation of a heating apparatus.[48] But this case comes very close to the boundary of affirmative relief. It seems likely therefore, that this practical consideration would weigh heavily with the chancellor.

In view of these conflicting principles even a tentative prophecy seems of doubtful value. The most that can be said is that each case must be rested on its own particular facts. If the injury to the plaintiff were great and irreparable, and if the court could efficiently grant relief it may be that the court would set off the

[46]Gun *v.* McCarthy (1884) L. R. Ir. 13 Ch. D. 304. See also Grant Marble Co. *v.* Abbott (1910) 142 Wis. 279; Glass *v.* Hulbert (1869) 102 Mass. 24, 44

[47]Cotting *v.* Boston (1909) 201 Mass. 97. Stenz *v.* Mahoney (1902) 114 Wis. 117.

[48]Jones *v.* Parker (1895) 163 Mass. 564.

wrong of the defendant against the impropriety of making a contract by judicial decree. But if damages would substantially compensate the plaintiff, the court would have a strong tendency to overlook some inadequacy in the relief and leave the plaintiff to his remedy at law.

In summary then we have the following propositions:

1. Where an easement is appurtenant to an estate less than a fee, or where an estate less than a fee is subject to the easement, termination of such estate, determines the easement also.

2. Where an easement is appurtenant to a given structure as distinguished from the fee, or when a given structure as distinguished from the fee is subject to an easement, destruction of such structure by the owner or by the act of God, or by operation of law, extinguishes the easement.

3. Where a limited easement for a particular purpose is created and user of such easement is either originally impossible, or becomes impossible, by the act of God or by operation of law, the easement is thereby extinguished.

4. Where an easement consists of a principal right and certain incidents, determination of the principal right determines the incidents also even though such incidents, if continued, would be beneficial to the dominant estate.

5. If the owner of the servient tenement should wrongfully destroy such tenement, the extent to which equity will lend its aid to compel him to restore the tenement and thereby revive the easement is still uncertain upon the authorities and must be decided in the light of general principles and upon the particular circumstances of each case.

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